

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 34 of 1977

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

KHODABHAI MOHANBHAI RATHOD

Versus

BAULABHAI JASUBHAI RATHOD SINCE D/D THROUGH HEIRS

Appearance:

MR SURESH C SHAH for Appellant

MR HM PATEL for AJ PATEL for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 19/11/1999

ORAL JUDGEMENT

1. This Second Appeal under section 100 of the Code of Civil Procedure is preferred by the appellant defendant challenging the judgment and order passed by the learned Assistant Judge, Kheda at Nadiad, in Regular Civil Appeal No. 184 of 1975 whereby the learned judge was pleased to allow the appeal preferred by the respondent- plaintiff and set aside the judgment and

decree passed by the learned Civil Judge (Junior Division) Anand in Regular Civil Suit No. 229 of 1970 dismissing the suit of the respondent- plaintiff.

2. The respondent-plaintiff filed a suit for declaration that he is the independent owner and in actual possession of the property, more particularly described in para 1 of the plaint and for a further declaration that the document of sale dated 10.2.1969 Ex. 95 executed in favour of the respondent by one Babubhai Zaverbhai is illegal and void and for a mandatory injunction requiring him to remove the construction if any made in or upon the disputed property and for a perpetual injunction restraining him in future from making construction of any nature in or upon the same. It is the case of the respondent that in village Ravlapura of Anand Taluka, there is a house site plot bearing Panchayat No. 511 C in the east-west and north-south area of 44 and 24 respectively of which he is the independent owner. According to him, he has purchased the said property from his uncle Rathod Punjabhai by a registered sale deed dated 8.7.1942 (Ex.79) and, thus, he has become the owner and is in actual possession of the same. As per his say, he is tethering his cattle and using the land to stack fire wood, grass etc. therein. He has been paying tax in the panchayat in respect of this property. Thus, according to him, the present appellant has no right, title, share or interest in the same. In spite of that, he has committed trespass on or about 26.6.1976 in his absence and started digging foundation for making construction on the same. He, therefore, filed the suit for the reliefs prayed in the suit.

3. The appellant, in his written statement Ex. 9, while denying the averments and allegations, inter alia contended that the document dated 8.7.1942 Ex.79 is not a legal document and that Punjabhai had no right to execute the said document in respect of the suit property. According to him, the said document was never acted upon. As per the say of the appellant, in presence of the panchas, the respondent has treated the said document dated 8.7.1942 as cancelled in favour of Babubhai Zaverbhai, the son of his uncle said Babubhai Zaverbhai who was in actual possession of the disputed land and was making use of the same as it had fallen to his share in partition. According to him, said Babubhai sold the disputed property to him for a valuable consideration under a registered deed of sale dated 10.2.1969 Ex.95. Since then, he is the owner and in actual possession of the same. He has, therefore, every right to make

construction on the same, as an owner.

4. The learned trial judge dismissed the suit of the respondent by holding that the respondent has failed to prove his ownership as well as the possession so far as the suit property is concerned and has also failed to prove that the appellant has committed a trespass. He has recorded a finding that the appellant has proved that the disputed land was of his exclusive ownership and he has derived title of ownership by a legally executed registered sale deed dated 10.2.1969 executed by Babubhai Zaverbhai in his favour.

5. In the appeal, the lower appellate court set aside the finding of the trial court by holding that the trial court has committed an error in coming to the conclusion that the respondent has failed to prove that he is the owner of the suit property and has further held that the trial court has also committed an error in coming to the conclusion that Babubhai Zaverbhai was the owner of the suit property and, therefore, the appellant has acquired a valid title over the suit property on the basis of the document of sale executed in his favour by said Babubhai.

6. As stated above, the appellant has challenged this finding recorded in the judgment and order passed against him by the lower appellate court in this appeal.

7. Mr.S.C.Shah, learned advocate appearing for the appellant, after taking me through the evidence on record, submitted that the appellant has purchased the suit property by a registered sale deed dated 10.2.1969 from Babubhai Zaverbhai and has become the owner of the suit property. In the submission of Mr.Shah, in view of the record of the panchayat, the property was owned by Babubhai and, therefore, Babubhai had all the rights to dispose of the property in favour of the appellant. Mr. Shah emphasized the fact that the respondent never objected in respect of the change of names in the panchayat record since 1967 and, therefore, on the basis of principle of estoppel also, the respondent is not entitled to claim any relief as prayed for. Mr.Shah invited my attention to the document Ex. 84 executed by the respondent in favour of one Liliben wherein it has been declared that on the southern side of the said vended property is situated the house site land of Babubhai Zaverbhai. In the submission of Mr. Shah, this admission on the part of the respondent would go to show that the respondent was not the exclusive owner of the suit lands.

8. Mr. H.M.Patel, learned advocate appearing for the respondents, while supporting the judgment passed by the lower appellate court, submitted that no interference is called for as no substantial question of law is involved to be decided by this Court in this appeal.

9. Having gone through the record, it appears that one Jalambhai had three sons, named Punjabhai, Jusabhai and Zaverbhai. The respondent is the son of Jusabhai while Babubhai is the son of Zaverbhai. It is also clear that Punjabhai who died without leaving any heirs was the owner of the suit property and during his life time, he had executed a registered sale deed in favour of the respondent on 8.7.1942 vide Ex. 79. The execution of the document in favour of the respondent by Punjabhai is not disputed by the appellant. On the contrary, in the written statement, he has admitted that Punjabhai had executed document on 8.7.1942 in favour of the respondent. Needless to say, it is a registered deed of sale. Since Punjabhai and the witnesses attesting the said document are dead, no one could be examined. In view of the fact that the said document is 30 years old and the same was tendered in the evidence and was exhibited, the question arises as to whether Punjabhai was justified in disposing of the suit land in favour of the respondent. As stated above, Punjabhai was the brother of the father of the appellant as well as brother of the father of Babubhai Zaverbhai. The suit property being the ancestral property, Punjabhai had also acquired proprietary interest in the suit property. Reading Ex. 79, it is clear that the said document is in respect of the house as well as the land measuring 44 x 24 ft. from east west and north south respectively. The said document also reveals that there was a partition between Punjabhai and his brothers which took place many years before and the property had fallen to the share of Punjabhai and it is in this way that he has become the owner of the same and consequently he was competent to deal with it in the manner he liked. Now, this document was executed way back in 1942. There was no enmity with Babubhai and, therefore, Punjabhai had no reason to come out with a false statement of partition. When he executed this document, the present litigation was also not in contemplation. If really this property had not fallen to his share and had remained undivided or if only a portion of it had fallen to his share, he had no reason to execute the sale deed in favour of the respondent. There is nothing on record to show that Punjabhai was motivated to execute the document of sale Ex. 79 in favour of the respondent. In any case, in view of the statement as to the partition and that the property had

fallen to his share as appearing in the document Ex. 79, as also the statements of dead persons made 30 years ago, when there was complete harmony in the family and when the present litigation was not at all in contemplation, this document is required to be respected by giving due weightage. Even though the said document is of the year 1942, no steps were taken by any member of the family including Babubhai Zaverbhai to challenge the same by filing proceedings in the competent court of law for a declaration that Punjabhai was not the exclusive owner of the suit property and that the said document does not affect the right of others or that it is wholly illegal. In this view of the matter, I am clearly of the opinion that Punjabhai was the exclusive owner of the suit land and he accordingly sold the same to the respondent by executing a registered sale deed Ex. 79. Having held that Punjabhai was the owner and if the property is found to be of the ownership of Punjabhai, it will have to be held that Babubhai had no proprietary rights in the suit land and consequently he was not competent to execute any document of sale in favour of the appellant. It is, however, the case of the appellant in his written statement that the respondent himself in the presence of panchas had cancelled the document Ex. 79 in favour of Babubhai. It was, therefore, contended that the document Ex. 79 was never acted upon. There is nothing on record to prove this specific defence raised by the respondent in the written statement. An attempt was made by the learned advocate appearing for the appellant to peruse the document mark 35/1 alleged to have been executed by the respondent in favour of Babubhai. Since this document was not exhibited and especially when the respondent, in his evidence, has denied the execution of the said document, it is not possible for me to refer to the said document. Suffice it to say that by not examining any person to show that the respondent had orally cancelled the document Ex. 79 in presence of panchas, it is not possible for me to hold that the document Ex. 79 was never acted upon. Much have been said about the entries in the panchayat record. It appears that Babubhai had applied to the panchayat for entering his name in the panchayat record as the owner of the suit land and his name was in fact entered and recognised as the owner by the panchayat and the panchayat had in fact passed necessary resolution. That resolution was passed on 30.11.1967. Over and above the same, reliance is also placed on the payment of tax in the panchayat in respect of the property for 1969-70 by the appellant. Now, merely because Babubhai succeeded in getting his name entered in the panchayat record, that fact itself cannot be utilised by the appellant who is

the successor-in-title to show that he has been recognised as an owner by the panchayat. It is now well settled that the entries in the panchayat record have a fiscal value and they cannot have the effect of converting proprietary right or extinguishment of a title of some person.

10. The Supreme Court, in the case of S.J. Patel Vs. Vithalbhai J. Patel, 1938(2) GLR 104, has clearly laid down that the mutation entries are only to enable the State to collect revenue from the persons in possession and enjoyment of the property and the right, title and interest as to the property should be established de hors the entries. The entries are only one of the modes of proof of enjoyment of the property. Mutation entries do not entitle any right, title or interest therein. In view of this, the appellant cannot succeed on the ground that Babulal got entered his name as the owner of the suit property in the panchayat record. Since Babubhai Zaverbhai has failed to establish his acquisition of title over the suit land, it is required to be held that he had no proprietary title, with the result that he could not have transferred any proprietary title of the suit land in favour of the appellant.

11. Much has been contended about the description of the southern boundary as described in the sale deed Ex. 84 executed between the respondent and one Liliben. It is stated in the said document that the property under sale is situated to the north of the suit property. It is also stated that to the south of the property, house site land of Babubhai Zaverbhai is situated. It is, therefore, submitted that this is nothing but an admission of the respondent that the property to the south of the property vendued by him by this document is of the ownership of Babubhai. In fact, by showing the boundaries shown in Ex. 95 executed between Babubhai and the appellant, an attempt was made to point out that the entire suit land was not given to the respondent under the sale deed Ex. 79, but some portion out of the entire land was given to him. On the basis of the boundaries shown in different documents, it is not possible for me to decide as to the exact size of the land and as to which portion out of the same has been sold to the respondent Punjabhai vide Ex. 79. Once the document Ex. 79 is executed whereby the measurements of the land as well as other description is given, it is required to be accepted and implemented. It is not possible for the Court to decide the case on the basis of certain circumstances, namely description of boundary and measurements of lands stated in the document and to hold

that only part of the land was sold to the respondent.

12. In any case, this being a Second Appeal under section 100 of the Civil Procedure Code and especially when a finding is recorded by the lower appellate court that the respondent plaintiff has become the owner of the land in question as per Ex. 79, the said finding is binding to this Court and the same cannot be questioned. Thus, in absence of any question of law much less any substantial question of law involved in this appeal, it is not possible for me to take a different view in the matter.

13. Since I am in total agreement with the judgment and order passed by the lower appellate court, I see no merits in this appeal and the same is dismissed. The appellant is directed to pay costs throughout to the respondents and bear his own costs. Order accordingly.

sonar/-